No. 92-1413

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Supreme Court of the United States

October Term, 1992

WALGREEN COMPANY, ATICO INTERNATIONAL INCORPORATED, f/k/a J & M ENTERPRISES, d/b/a ATICO, NEW ATICO INTERNATIONAL, LTD., d/b/a NEW ATICO, a/k/a ATICO,

Petitioners,

v.

PHILLIP OINESS and SUN PRODUCTS GROUP, INC.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

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REPLY BRIEF IN FURTHER SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETER T. COBRIN
Counsel of Record

COBRIN GITTES & SAMUEL
535 Madison Avenue
New York, New York 10022
(212) 486-4000
Counsel for Petitioners

RICHARD I. SAMUEL
JONATHAN HUDIS
Of Counsel

EDITOR'S NOTE

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Introduction

Petitioners herein submit this Reply Brief in further support of their Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit. This Reply serves solely to respond to Respondents' misinterpretation of the record, pertinent statutes and legal precedent contained in their Brief in Opposition to Petition for Writ of Certiorari.

ARGUMENT

I

It is clear that the Federal Circuit Court of Appeals below, contrary to this Court's decision in *Salve Regina College v. Russell*, and that of several Regional Circuit Courts that have followed *Salve Regina* since it was Decided, erroneously conducted a Deferential Standard of Review of the District Court's determination of Washington State Law.

Respondents do not contest that a Court of Appeals should review *de novo* a District Court's determination of state law. *Salve Regina College v. Russell*, 111 S.Ct. 1217, 1221 (1991). The Federal Circuit Court of Appeals, however, failed to comply with the directives of *Salve Regina*, contrary to the appellate procedure undertaken by those Regional Circuit Courts of Appeals that have followed *Salve Regina* since it was decided, in cases where subject matter jurisdiction in the District Court was based upon a Federal question and State law on substantive issues had a bearing on the case. (Pet.Cert., pp.13-14).

Respondents, moreover, concisely encapsulate the clear error made by the Colorado District Court in its determination of the substantive law of the State of Washington, as follows:

> The District Court found that *Sun Products was not a proper party to the suit* because it had been administratively dissolved by the Secretary of State for the State of Washington for failure to file a periodic corporate report. *However, the District Court found that Oiness, as a shareholder and director of Sun Products, with the consent of the other shareholders/directors Younger and Mayon, could sue as a successor to the corporation.* (Opp.Brf., p.5) (Emphasis Added).

Petitioners have shown, in exhausting detail, that the decision of the Colorado District Court, in allowing the action "by Oiness as successor to Sun Products" to continue, was based upon a clear

misapplication of the controlling corporate law of the State of Washington. (Pet. Cert., pp.5-10). By refusing to review the District Court's decision *de novo*, the Federal Circuit Court of Appeals compounded the error.

Respondents, however, assert that:

> This was not a determination of unsettled law or inarticulable intuition as was the case in *Salve Regina* ... (Opp. Brf., .8).

Respondents' first comment is incorrect, the second inapposite.

Research by Petitioners found *no case* rendered by the Supreme Court for the State of Washington interpreting the controlling statute, RCW §23B.14.340 or its predecessor statute RCW §23A.28.250 (superseded). *Pacesetter Real Estate v. Fasules*, 53 Wash. App. 463, 767 P.2d 961 (1989) and *Zimmerman v. Kyte*, 53 Wash. App. 11, 765 P.2d 905 (1989), cited by Respondents, are intermediate appellate decisions interpreting the *former* RCW §23A.28.250 (superseded). Thus, the meaning and interpretation of RCW §23B.14.340 is far from "settled".

The "inarticulable intuition" of the district court as expressed in *Salve Regina, supra.*, 111 S.Ct. at 1220, has no application to the present case, one way or the other. The Rhode Island District Court in *Salve Regina* purported therein to have a "feel for what the Rhode Island Supreme Court will or won't do" with respect to its interpretation of state contractual law. *Id.* Here, in contrast, the Colorado District Court could not have a "feel" for how the Supreme Court for the State of Washington would interpret RCW §23B.14.340 under the facts of this case, as it had no discernable prior experience with Washington State Law. This is an even more important reason why the Federal Circuit Court of Appeals should have applied a *de novo*, rather than a deferential, standard of review of the Colorado District Court's determination of Washington State Law. However, it did not do so.

Respondents further assert that:

> It is improper to fault the Court of Appeals for the Federal Circuit for improperly reviewing the matter based upon a one sentence question by a single judge during oral argument. The decision of the Court of Appeals does not reflect a failure or refusal to conduct a *de novo* review but merely found the Petitioners' state law argument was without merit ... (Opp. Brf., p.8).

First, the decision of the Federal Circuit below (Pet. Cert., pp.A1-A5) provides *no guidance whatsoever* as to its reasoning process in affirming the Colorado District Court's determination of Washington State Law. Second, the "one sentence question by a single judge during oral argument" is the only source the parties, or this Court, have to determine this reasoning process. This "one sentence question" shows that the Federal Circuit engaged in a deferential standard of review of the Colorado District Court's determination of Washington State Law. This was improper.

Respondents further assert that Petitioners have somehow concocted a fallacious argument that:

> All corporate property rights simply evaporate with the administrative dissolution of the corporation with a subsequent loss of right to the shareholders and creditors but a windfall gain to debtors and those who have tortiously wronged the corporation ... (Opp. Brf., p.9).

Quite simply, this is not a concocted argument, but *the law* of the State of Washington. RCW §23B.14.340 is a statute bearing upon the *sui generis* "capacity" of a dissolved Washington corporation. *Columbia River Service Corp. v. Gilman*, 751 F.Supp.1448 (W.D. Wash. 1990). The Washington Statute does not concern itself with the substantive property rights/obligations of a defunct Washington corporation, but whether a remedy exists with respect to those rights/obligations. Here, the purported "remedy" of Sun Products expired long before it commenced suit.

Respondents cite as alternatively controlling authority RCW §23B.14.050(2)(e). Petitioners have already distinguished that statute as inapposite to the present action; and, to the extent that RCW §23B.14.050(2)(e) conflicts with RCW §23.B.14.340, Petitioners have shown conclusively that RCW §23B.14.340 controls (Pet. Cert., pp.9-10).

Respondents speciously assert that "[t]his revised statute retained the post-dissolution remedies of *Pacesetter*...and *Zimmerman*...". (Opp. Brf., p.9). As previously stated, the *Pacesetter* and *Zimmerman* cases were decided under the *former* RCW §23A.28.250. Additionally, Petitioners have shown that the *Pacesetter* and *Zimmerman* cases have been overruled by legislative fiat. (Pet. Cert., pp.7-8).

Respondents further state that:

> RCW §23B.14.340 both permits lawsuits by the corporation within two years of dissolution and lawsuits thereafter brought by the directors, shareholders and officers on behalf of the corporation and in its corporate name. (Opp. Brf., p.9).

This argument has no basis in reason, nor is it supported by the legislative history of the Washington Statute.

This Court need only review the pertinent provisions of the predecessor statute (RCW §23A.28.250 (superseded)) and the successor statute (RCW §23B.14.340) to see that the operative language was significantly modified (Pet. Cert., p.3), as follows:

> RCW §23A.28.250 (superseded), in pertinent part, provides:
>
> The dissolution of a corporation ... by the issuance of a Certificate of Dissolution by the Secretary of State ... shall not take away or impair *any remedy available to or against such corporation*, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred prior to such dissolution if action or

> other proceeding thereon is commenced within two years after the date of such dissolution. Any such action or proceeding *by or against the corporation may be prosecuted or defended* by the corporation in its corporate name. The shareholders, directors and officers shall have the power to take such corporate or other action as shall be appropriate to protect such remedy right or claim. (Emphasis Added).

RCW §23B.14.340, in pertinent part, provides:

> The dissolution of a corporation ... by the issuance of a Certificate of Dissolution by the Secretary of State ... shall not take away or impair *any remedy available against such corporation*, its directors, officers, or shareholders, for any right or claim existing, or any liability incurred, prior to such dissolution if action or other proceeding is commenced within two years after the date of such dissolution. Any such action or proceeding *against the corporation* may be *defended* by the corporation in its corporate name. (Emphasis Added).

The change in the language of the statute is by no mere accident or happenstance. The legislative history of the amended statute provides, unmistakeably, that "affirmative causes of action do not survive dissolution". (Pet. Cert., p.A12, ¶2).

In an attempt to distance themselves as far from this statutory language as possible, Respondents argue:

> The Petitioners quote from a legislative bill summary as if that were the law, when the foregoing language of the statute clearly shows the "summary" to be incorrect. There is no need to review legislative history when the statute is clear. (Opp. Brf., p.10).

Petitioners agree that the statutory language is clear. Respondent Sun Products, a then-defunct Washington corporation, did not commence suit under the former RCW §23A.28.250 within

the 2-year statutory time frame. Further, Respondent Oiness did not move in the District Court to amend the caption[1] to assert the causes of action "as successor to Sun Products" until *after* the Washington statute was amended, by which time the amended statute had *cut off all rights* for Oiness to sue in a representative capacity.

It is clearly necessary that Respondent Sun Products remain as a party to this action in order for there to be an award of lost profits under *Panduit Corp. v. Stahlin Bros. Fibre Works, Inc.*, 415 F.2d 1152, 1156 (6th Cir. 1978). In this connection, Respondents urge that:

> Oiness individually and in his representative capacity on behalf of Sun Products met all of the requirements ... to permit the award of lost profits. (Opp.Brf.,pp.10-11).

Immediately after making this statement, Respondents attempt to *blur* the distinction between Respondent Oiness (the individual plaintiff) and Respondent Sun Products (the defunct corporate plaintiff) in an effort to transform a single individual into a full-fledged operating corporation having the "manufacturing and marketing capability to exploit the demand" for the headrest. The essential fact is that, without Respondent Sun Products, Respondent Oiness' right to seek the remedy of patent damages evaporates.

The Colorado District Court at 774 F.Supp. at 1281, 21 USPQ2d at 1657, allowed the suit on behalf of a "successor" to the defunct Sun Products to continue based upon a misapplication the law of the State of Washington. The Federal Circuit Court of Appeals compounded this error by failing to review *de novo* the Colorado District Court's erroneous determination of Washington State Law. This Court remains as Petitioners' last opportunity to seek redress with respect to the Colorado District Court's erroneous determination that Respondent Sun Products retains the capacity to maintain this suit.

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[1] It is to be recalled that the District Court denied this motion.

BEST AVAILA

II

Petitioners Respectfully Request that this Court Not Presume that Appellate Review was Properly Conducted by the Federal Circuit Court of Appeals.

Respondents argue that:

> It should be presumed that an appellate review was properly conducted except where the decision makes it clear that significant error occurred (Opp. Brf., p.11).

Respondents cite no statutory authority nor precedent to support this statement. The decision of the Federal Circuit Court of Appeals below is completely silent with respect to its standard of review of the state law determinations of the Colorado District Court. The only evidence this Court has to determine the Federal Circuit's thought processes is the statement of the Court during oral argument (Pet. Cert., p.11). This evidence clearly shows that the Federal Circuit Court of Appeals merely deferred to the Colorado District Court without legal analysis.

Further, Respondents state:

> "As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a Writ of Certiorari." *Richlin v. N.Y. Co.*, 304 U.S. 202, 206 (1938). (Opp. Brf., p.12)

Respondents completely misperceive the nature of the conflict created by the Federal Circuit Court of Appeals as compared to the Regional Circuit Courts of Appeals. The conflict is not as to the insular interpretation of Washington State Law, but rather the standard of review from a district court's *determination* of controlling substantive state law.

Far from presuming that the Federal Circuit Court of Appeals properly conducted its appellate review, the evidence submitted by Petitioners indicates to the contrary.

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III

The Colorado District Court failed to follow 28 U.S.C. §1652 in erroneously applying Washington State law, and the Federal Circuit Court of Appeals compounded this error.

Respondents assert that:

> The decision of the District Court was well founded *on statute* and case law of Washington ... (Opp. Brf., p.13).

The Colorado District Court's determination of Washington State law, 774 F.Supp. at 1281, 21 USPQ2d at 1657 was based on an intermediate appellate decision of the Washington Court which has since been overruled by legislative fiat. In making its erroneous determination of Washington State law, the Colorado District Court did not even mention the predecessor statute (RCW §23A.28.250) nor the statute that applied on the date that the District Court rendered its decision (RCW §23B.14.340). In short, Washington State Law was not properly "regarded as [the] rule[ ] of decision " by the District Court. 28 U.S.C. §1652.

The Federal Circuit Court of Appeals, in its decision below, provides no evidence that it reviewed for itself this erroneous determination of Washington State Law. Had the Federal Circuit done so, the District Court's error would have been corrected.

IV

The Colorado District Court and the Federal Circuit Court of Appeals clearly violated the Tenth Amendment to the United States Constitution.

The determination of the Colorado District Court of the question of Washington State law was plain error. There is no question but that the District Court substituted its view of what the law of the State of Washington should be for that of the legislature of the State of Washington.

The Federal Circuit Court of Appeals did not certify the question to the Washington Supreme Court, nor did it review for itself, *de novo*, whether the Colorado District Court's "substituted

judgment" was in fact correct. At the expense of Petitioners' rights, the Federal Circuit Court of Appeals merely "rubber-stamped" the erroneous determination of Washington State law by the Colorado District Court. Future litigants seeking guidance as to the meaning of the language of the Washington Statute will be misled. As matters now stand, the reported decision of the Colorado District Court, affirmed by the Federal Circuit Court of Appeals, will erroneously imply that *Zimmerman*, *supra.*, remains as good law, when it does not. The spirit of Federalism embodied in the Tenth Amendment to the United States Constitution was designed to prevent such a result, as herein suggested by Respondents.

Conclusion

The judgment of the United States Court of Appeals for the Federal Circuit below is in clear conflict with the Supreme Court and several Regional Circuit Courts of Appeals with respect to the standard of review of a district court's determination of substantive state law. What little evidence there exists with respect to the Federal Circuit's reasoning indicates that it erroneously engaged in a deferential standard of review. Respondents have failed to rebut Petitioners' supported assertions that the Federal Circuit clearly departed from the mandates of 28 U.S.C. §1652 and the Tenth Amendment to the United States Constitution, which prohibit a re-writing by the Federal Judiciary of the statutory scheme of the Washington State legislature. Consequently, Petitioners respectfully request that the Writ of Certiorari sought herein be granted.

Respectfully submitted,

PETER T. COBRIN
Counsel of Record

COBRIN GITTES & SAMUEL
535 Madison Avenue
New York, New York 10022
(212) 486-4000

Counsel for Petitioners

RICHARD I. SAMUEL
JONATHAN HUDIS
Of Counsel